No. [redacted] 13

In the

Supreme Court of the United States

OCTOBER TERM, A. D. 1964.

WALKER PROCESS EQUIPMENT, INC.,
Petitioner,

vs.

FOOD MACHINERY AND CHEMICAL CORPORATION,
Respondent.

BRIEF OF PETITIONER.

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OPINIONS BELOW.

The opinions of the District Court for the Northern District of Illinois (R. 57, 64) are not reported. The opinion of the Court of Appeals for the Seventh Circuit (R. 80) is reported at 335 F. 2d 315.

JURISDICTION.

Jurisdiction of this Court is invoked under Title 28 U.S. Code 1254(1), 62 Stat. 928. This Court granted certiorari on January 18, 1965.

STATUTES HERE INVOLVED.

Sherman Act, Section 2 (15 U.S. Code 2, 26 Stat. 209):

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with for-

eign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Clayton Act, Section 4 (15 U.S. Code 15, 38 Stat. 731):

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

United States Patent Code, Sec. 285 (35 U.S. Code 285, 66 Stat. 813):

"The Court in exceptional cases may award reasonable attorney fees to the prevailing party."

Patent Code in Effect in 1942 (Rev. Stat. 4886; 35 U.S. Code 31, found in 3rd Vol., 35 USCA, p. 817, 53 Stat. 1212):

"Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, or who has invented or discovered and asexually reproduced any distinct and new variety of plant, other than a tuber-propagated plant, not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than one year prior to his application, and not in public use or on sale in this country for more than one year prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor."

QUESTIONS PRESENTED.

The questions presented are:

1. Whether it is possible for a person injured in his business by a fraudulently secured patent monopoly on an unpatentable product to have a private claim for damages, the fraud comprising concealing from the Patent Office, and denying under oath, the facts of the patentee's own invalidating prior sales and use.

2. Whether a monopoly based on a fraudulently procured patent is exempted and shielded from the clearly expressed prohibitions of Section 2 of the Sherman Act by the mere existence of the patent which is the fraudulent instrument of monopoly.

3. Whether a patent infringement action, wherein it is established by the defendant that the patent in suit was obtained by the concealment and false denial by the patent owner of its own invalidating sales and use and in which action the patent owner attempts to conceal the facts of its conduct, is not an "exceptional case" within the provisions of Title 35 U.S. Code, Section 285.

STATEMENT OF THE CASE

This matter comes before the Court by writ of certiorari to review a decision of the Court of Appeals for the Seventh Circuit that Petitioner's second amended counterclaim (the first having been stricken for prolixity, R. 64) fails to state a claim on which relief can be granted, and that Petitioner is not entitled to attorney's fees in defending against Respondent's charge of patent infringement.

The Petitioner herein is Walker Process Equipment, Inc. (Walker) and the Respondent is Food Machinery and Chemical Corporation (FMC). The parties are competitors (FMC through its Chicago Pump Hydro-Dynamics Division) in the manufacture and sale of sewage treatment equipment.

On June 24, 1960 FMC brought suit (R. 3) in the Northern District of Illinois for alleged infringement of United States patent No. 2,328,655 (R. 5). The patent, which had issued to FMC on September 7, 1943, relates to aeration equipment for use in sewage treatment systems. During the life of the patent FMC had virtually no competition in the sale of the "swing diffusers" to which the patent is particularly directed (R. 50).

Discovery proceedings pressed by Walker brought out that a sewage treatment system, employing equipment of the patent and sold by FMC, had been installed and publicly operated with FMC's participation more than one year prior to the filing of the patent application on February 2, 1942 (R. 12-33, 36-50). Walker moved for summary judgment on the ground that there was sale more than one year prior to the patent application, invalidating the patent under 35 U.S. Code 102(b) (R. 34). At first FMC resisted the motion for summary judgment against it (R. 35), but, after further discovery by Walker, FMC moved to dismiss its own action with prejudice (R. 55).

At the same time that FMC moved to dismiss its own complaint, Walker asked for attorney's fees because FMC had obtained the patent by concealing its own invalidating prior public use, had maintained the fraudulent patent and brought suit on it, and had repeatedly evaded and resisted discovery of the invalidating facts (R. 51-54).

The District Court denied Walker's application for attorney's fees, granted FMC's motion to dismiss its complaint with prejudice, denied Walker's motion for summary judgment thereby made moot, and granted Walker leave to amend its counterclaim (R. 57-59).*

* The first counterclaim was filed with the Answer and did not include the allegations of facts later discovered (R. 11).

The amended counterclaim, dismissal of which without leave to amend and with prejudice is now at issue, charges (R. 60-63) that FMC illegally monopolized interstate and foreign commerce by fraudulently and in bad faith obtaining and maintaining against the public and Walker its patent in suit No. 2,328,655. The counterclaim alleges in paragraph 19, that at the time FMC brought suit for patent infringement, it knew that the patent was not properly issued (R. 62) and, in paragraph 15 (R. 60), that FMC knew it had no legal basis for the patent—in that FMC itself had every feature thereof in public use more than a year before the application date. In 1956 Walker called FMC's attention to the question of its own public use and possible fraud, but FMC denied any duty to look into the question and took no action to remove or reduce the monopoly effect of the patent (Paragraph 18, R. 61-62). The counterclaim also alleged that FMC had used this patent, which it knew to be invalid, to restrict competition (Paragraph 20, R. 62). Walker, because of this, lost substantial sums of money—some of which losses are specifically alleged in Paragraph 22 (R. 62).

FMC moved to dismiss this counterclaim on the ground that it failed to state a claim upon which relief can be granted "under the federal antitrust laws or under any other law or laws" (R. 63). The District Court granted the motion (R. 69) on the ground that only the United States can bring an action alleging fraud in the procurement of a patent (R. 64-68).

The Court of Appeals affirmed dismissal of the counterclaim on the ground that a private litigant, injured by another's fraud on the Patent Office, has no standing to sue, and affirmed the denial of attorney's fees on the ground that this was not an "exceptional case" (R. 80-82).

SUMMARY OF ARGUMENT.

The Court of Appeals erred in holding that an action will not lie for damages caused by a patent which was fraudulently obtained, and fraudulently maintained and asserted. The stated basis for the decision was that a private litigant may not rely upon fraud on the Patent Office in an affirmative action. In so ruling, the Court held contrary to rulings of this and other Courts.

The counterclaim alleges that Respondent, FMC, has monopolized and has restricted competition by its fraudulently obtained and maintained patent. It also alleges that as a direct result Petitioner, Walker, was damaged. FMC should not be permitted to use a patent obtained by its own fraud as a shield against antitrust prosecution. The exemption from the antitrust laws accorded to proper practices under the patent laws does not extend to fraudulently obtaining, maintaining, and asserting a patent. Allowance of a claim for damages, such as Walker's, would further the purposes of both the patent laws and the antitrust laws.

FMC originally brought this patent infringement action on a patent which was invalid in view of FMC's own sale and participation in public use of the specific subject matter of the patent. It evaded and resisted discovery proceedings seeking to prove the invalidity and the fraud on the Patent Office. When Walker finally had proof of the facts and moved for summary judgment, FMC voluntarily dismissed its complaint with prejudice. This is the "exceptional case" in which, by statute, attorney fees may be awarded the prevailing party.

ARGUMENT.

I. The Court Of Appeals Erred In Holding That No Action Will Lie For Damage Caused By Acts Including Fraud On The Patent Office.

By its Motion to Dismiss, FMC is deemed to have admitted the allegations of the counterclaim. *United States* v. *New Wrinkle, Inc.*, 342 U.S. 371, 376 (1952). See *Guessefeld* v. *McGrath*, 342 U.S. 308, 310 (1952); *Abington School District* v. *Schempp*, 374 U.S. 203, 212 (1963). Thus the basic question is whether an action will lie for damages caused by a patent admitted to have been fraudulently obtained and fraudulently maintained and asserted.

The counterclaim charges that FMC (including its predecessor) "monopolized interstate and foreign commerce by fraudulently and in bad faith obtaining and maintaining against the public and this defendant, its patent in suit No. 2,328,655, well knowing that it had no basis for and had forfeited any rights it might have had to a patent" (Par. 15, R. 60). Details of the invalidating prior sale by FMC, and prior use in which FMC participated, are alleged (Par. 16, R. 60-61).

FMC filed the application with an untrue oath denying such prior public use and sale (Par. 17, R. 61), at no time calling these facts to the attention of the Patent Office (Par. 17, R. 61), as was its duty, *Precision* v. *Automotive* Co., 324 U.S. 806, 818 (1945).

The counterclaim further excludes any possibility that the falsely denied facts had been innocently overlooked by alleging that in 1956 Walker specifically called the attention of FMC to the question of the existence of its

own invalidating public use, fraud being mentioned. The patent owner denied any duty to look into the question (Par. 18, R. 61, 62). Instead, FMC subsequently brought suit on the patent against Walker (Par. 19, R. 62), alleging (in spite of its knowledge to the contrary) that the patent in suit had been "duly issued". Moreover, throughout the life of the patent, FMC has used it to restrict and impede competition in the sale of equipment not covered by the patent and has thereby additionally monopolized trade in such commerce (Par. 20, R. 62). The monopoly effect continued even after expiration of the patent because it deprived Walker of acquiring, during the term of the fraudulent monopoly, the experience which purchasers in this field require of their equipment suppliers (Par. 21, R. 62).

The acts of FMC in obtaining, maintaining and attempting to enforce the patent, knowing it to have been obtained in bad faith, deprived Walker of business. Specific instances where Walker had received orders or was low bidder but lost sales because of the patent are alleged (Pars. 21 and 22; R. 62 and 63).

The Court of Appeals held that the counterclaim alleging these facts failed to state a claim upon which relief could be granted, on the ground that fraud on the Patent Office may not be relied upon in an affirmative action, as distinguished from being relied upon as a defense (R. 80-82). In so ruling the Court held directly contrary to the ruling of this Court in *Shawkee Mfg. Co.* v. *Hartford Co.*, 322 U.S. 271, 274 (1944) which clearly sets out a right

to recovery of damages resulting from the use of a patent fraudulently obtained.*

The decision of the Court of Appeals is also contrary to decisions of other courts which have permitted allegations of fraud on the Patent Office in affirmative pleadings. In *Clinton Engines Corp.* v. *Briggs & Stratton Corp.*, 175 F. Supp. 390 (D.C. E.D. Mich. S.D. 1959), motion for summary judgment was denied and a pleading sustained which charged obtaining and enforcing patents known to be invalid as part of a scheme to create and maintain a monopoly in violation of the anti-trust laws. The court relied upon an analogous situation in a trade mark case *Kellogg* v. *National Biscuit Co.*, 71 F.2d 662, 665-666 (CA 2, 1934). In *Woolridge Mfg. Co.* v. *R. G. LaTourneau, Inc.*, 79 F. Supp. 908, 909 (D.C. N.D. Cal. 1948), the court refused to strike allegations of fraud in obtaining a patent both as a misuse defense and as part of a violation of the anti-trust laws.

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* Subsequent to the discovery of the fraud practiced on the Patent Office and on the courts, Shawkee and others moved in the Court of Appeals to have the prior judgment against them set aside and prayed that a Master be appointed by that court to determine certain damages including "damages sustained by them because of Hartford's unlawful use of its patent" (322 U.S. 274). In effect, this was a counterclaim such as that here dismissed. This court ruled with respect to the prayer for damages, that "whether this type of relief will be granted must depend upon further proceedings in the District Court which entered the judgment of infringement." (p. 274). This court further directed that Court of Appeals to (p. 274):

> "* * * permit Shawkee and the others to bring such further proceedings as may be appropriate in accordance with their prayer for relief."

Subsequent proceedings in the case show that affirmative relief was granted, *Hartford Co.* v. *Shawkee Mfg. Co.*, 163 F. 2d 474 (CA 3, 1947).

The Court of Appeals reached a conclusion conflicting with this Court's decision in *Shawkee Mfg. Co.* v. *Hartford Co., supra*, on the ground that only the United States can bring an action to *cancel* a patent, for fraud on the Patent Office (citing *Mowry* v. *Whitney*, 81 U.S. (14 Wall.) 434, 1871) and since fraud on the Patent Office may not be the basis of having a patent declared invalid in a declaratory judgment action (citing *E. W. Bliss Co.* v. *Cold Metal Process Co.*, 102 F. 2d 105, C.A. 6, 1939 and *I.C.E. Corp.* v. *Armco Steel Corp.*, 201 F. Supp. 411, D.C.S.D.N.Y. 1961), therefore fraud on the Patent Office may not be relied upon for affirmative relief in any action, antitrust or otherwise. The conclusion does not follow. Walker does not ask cancellation of the patent (which expired in 1960) nor a declaratory judgment that it was invalid (the complaint previously having been dismissed with prejudice). Walker seeks to recover damages for the injury caused it by the acts of FMC in fraudulently obtaining and using the patent.

Walker has pleaded that FMC has restricted competition to Walker's loss. The motion to dismiss admits these allegations. FMC says that it had a right to restrict competition because it had a patent. Walker says that the patent was obtained and retained with full knowledge of the fraud. This is admitted by the motion to dismiss. FMC says that this cannot be used against it because only the government can cancel the patent. Walker says the patent has expired; it does not seek its cancellation, but insists that FMC cannot use a patent obtained by its own fraud to avoid the antitrust laws.

In *Mowry* v. *Whitney, supra*, relied upon by the Court of Appeals, the principal point was, by analogy to the old English practice, that only the sovereign could institute

proceedings to rescind that which the sovereign had granted. This has no application to the present case. Although the United States can, and does, bring actions to enforce the antitrust laws, private litigants who have been damaged are also authorized to sue (15 U.S. Code 15, 38 Stat. 731).

E. W. Bliss Co. v. *Cold Metal Process,* 102 F. 2d 105 (CA 6, 1939), upon which the Court of Appeals relied, was decided prior to this Court's decision in *Hazel-Atlas Co.* v. *Hartford Empire Co.,* 322 U.S. 238 (1944) and probably no longer represents sound law, if it ever did.* The *Bliss* opinion relied upon *Mowry* v. *Whitney,* 81 U.S. (14 Wall.) 434 (1871) and *United States* v. *Bell Telephone Co.,* 128 U.S. 315 (1888), but in so doing overlooked the difference between the right of the United States, alone, to *cancel* a patent, and the right of a private litigant to prove *invalidity* or unenforceability. Moreover, *United States* v. *Bell Telephone Co.* at page 357 appeared to recognize that an individual victim of a fraud should have a remedy:

> "* * * If such a fraud were practiced upon an individual, he would have a remedy in any court having jurisdiction to correct frauds and mistakes and to relieve against accident; * * *".

The counterclaim alleges facts showing that FMC committed fraudulent and wrongful acts and that as a direct result Walker was damaged. There is no public policy which permits a patent owner to use his fraud as a shield

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* See Keaveney, *Fraud in the Procurement of a Patent as a Defense to Infringement,* 33 J. Pat. Off Soc'y 482, 493-494, 501. If fraud in procurement of a patent may be pleaded in defense to an action for patent infringement, why may it not be pleaded in a declaratory judgment action in defense to a charge of patent infringement?

against antitrust prosecution. No public policy is conceived which should prevent one injured by such fraud and other acts from seeking redress. Indeed, allowance of such actions could further discourage misrepresentation to the Patent Office.

A lawful patent monopoly is a recognized exception to the monopolies prohibited by Section 2 of the Sherman Act. However, the patent laws do not create a total exemption from the antitrust laws. Activity within the scope and purposes of the patent laws, though they lead to a "monopoly"—which may be as absolute a monopoly as can be—is shielded from antitrust charges by the patent laws. But a misuse of patents is outside that shield. *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U.S. 661 (1944).

In dealing with another exemption to the antitrust laws, permissible restraints of trade under regulations of a securities exchange, this Court held that an antitrust action would lie for acts beyond the scope and purposes of the Securities Exchange Act; *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963). The opinion of the Court pointed out that the exemption from the antitrust laws is "only to the extent necessary to protect the achievement of the aims" of the exempting statute (373 U.S. at p. 361).

Surely, the fraudulent procurement and assertion of an invalid patent is not within the purposes of the patent laws. The "achievement of the aims" of the patent laws does not require that the fraud-feasor be permitted to keep the spoils of his fraudulently procured and maintained monopoly. Indeed, the achievement of the aims of both the patent laws and the antitrust laws are advanced by permitting the victim of a fraudulently acquired and asserted patent monopoly to sue for damages.

The opinion of the Court of Appeals states (R. 82):

> "Since Walker admits that its anti-trust theory depends on its ability to prove fraud on the Patent Office, it follows that the district court was correct in deciding that Walker's second amended counterclaim failed to state a claim upon which relief could be granted."

This statement errs in two respects. First, no question of proof is here involved since fraud on the Patent Office has been admitted by the Motion to Strike the Counterclaim. Second, no policy or authority requires that one damaged by a monopoly and restraint beyond the legitimate protection of the Patent Laws should be denied relief. The question is simply whether a plaintiff which has admitted that it defrauded the Patent Office into the issuance of an invalid patent—now expired—may with impunity damage a competitor by asserting the fraudulently obtained patent. No case has held to the contrary. The decisions of *Kellogg* v. *National Biscuit Co.*, 71 F.2d 662, 665-666 (CA 2, 1934), *Clinton Engines Corp.* v. *Briggs & Stratton Corp.*, 175 F.Supp. 390, 406 (D.C.E.D. Mich. S.D., 1959)* and *Woolridge Mfg. Co.* v. *R. G. LaTourneau, Inc.*, 79 F.Supp. 908, 909 (D.C.N.D. Cal., N.D. 1948) are authority for the proposition that such action constitutes a violation of the antitrust laws.

Once the antitrust laws are involved, the court will go behind any curtain, including a contract between the parties, to determine the true validity of a patent. *Edward Katzinger Co.* v. *Chicago Metallic Mfg. Co.*, 329 U.S. 394 (1947).

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* These decisions and this Court's decision in *Shawkee Mfg. Co.* v. *Hartford Co., supra,* were cited to and ignored by the Court of Appeals.

To allow an action to recover damages flowing from a restraint of trade, where the defense relies only upon a patent fraudulently obtained and fraudulently asserted would not impair or even affect the patent system.* Its effect would be wholesome as a penalty against fraud. Likewise, to allow such an action would not impair, but would further the purposes of the antitrust laws.

II. This Is An "Exceptional" Case Within The Meaning Of Title 35 USC Section 285 Warranting An Award Of Attorney Fees.

The Patent Statutes provide (35 USC 285):

> "The Court in exceptional cases may award reasonable attorney fees to the prevailing party."

Courts have heretofore considered "exceptional cases" to include those initiated or prosecuted in bad faith. *Algren Watch Findings Co.* v. *Kalinsky,* 197 F. 2d 69, 72 (CA 2, 1952); *Shingle Products Patents* v. *Gleason,* 211 F. 2d 437, 441 (CA 9, 1954); *Etten* v. *Lovell Manufacturing Co.,* 225 F. 2d 844, 849 (CA 3, 1955); *Seismograph Service Corp.* v. *Off Shore Raydist,* 263 F. 2d 5, 24, 28 (CA 5, 1958); *Talon Inc.* v. *Union Slide Fastener, Inc.,* 266 F. 2d 731, 739 (CA 9, 1959).

But both the Court of Appeals and the District Court held that the bad faith here shown did not even bring the case into the class of "exceptional cases" (R. 58, 82). Thus the point of the discretional allowance of fees was never reached.

We start with the patent which was invalid in view of FMC's own sale and participation in public use of the spe-

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* See 1959 Annual Survey of American Law, New York University School of Law, 1960, page 190.

cific subject matter of the patent.* From prior to the time the patent was issued, FMC had in its files documents demonstrating invalidity. In 1956, Walker called attention to the possibility of prior public use, and invited FMC to check into the facts and advise Walker, mentioning the question of fraud on the Patent Office (R. 16). FMC declined. Thereafter FMC filed this action.

Either such bad faith or FMC's unjustified and vexatious response to discovery efforts of Walker, alone, would justify an award of attorney fees. The latter sheds light on FMC's entire conduct with respect to the patent in suit. Walker's first effort at discovery was to inquire as to construction, shipping, testing and functioning of the piping (the key feature of the patent) in FMC's first installation. FMC gave most evasive, and in instances, incorrect answers in order to conceal the manufacture, sale, delivery, installation, testing and operation of the patented equipment well before the critical date of February 2, 1941. For example, as to date of shipping the piping for the first installation, FMC's documents (later produced by discovery) showed that shipment was scheduled for November 29, 1941 at the latest, that the customer was billed on December 6, 1940 and that installation on the site was practically complete by January 1, 1941 (R. 21), but FMC stated in answer to interrogatories that shipment was "Between December 6, 1940 and February 19, 1941" (R. 13). Even as to "commencing construction of

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* For the purposes of FMC's motion to dismiss Walker's second amended counterclaim, FMC is deemed to have conceded that the patent was procured by fraud. This admission does not carry over to the issue of attorney fees, but the District Court apparently accepted the charges. In any event the essential facts of fraud and invalidity have been fully established by discovery.

such piping", FMC would not give an unequivocal date prior to February 2, 1941. It answered, "Sometime after November 5, 1940 and prior to February 19, 1941" (R. 13) —even though it knew the construction of the piping had to have been completed during the year 1940.

FMC also stated that the first "testing" and first "useful functioning" of the piping was "On or about February 28, 1941" (R. 13). But FMC's documents showed that one of its men was getting ready to test on January 4, 1941 (R. 24) and the equipment was treating sewage by January 22, 1941 (R. 27).

Ultimately Walker extracted sufficient facts to show the invalidating prior sale and public use; but not without continued evasion by FMC (R. 17-33).

When Walker had sufficient facts to file its motion for summary judgment (R. 34), FMC at first opposed the motion (R. 35-36). Its sworn opposition required further discovery by Walker (R. 36-50). At this point, FMC gave up and moved to dismiss its own action with prejudice (R. 55).

In *Colgate-Palmolive Company* v. *Carter Products*, 230 F. 2d 855, 866 (CA 4, 1956), the Court expressed the purpose in awarding attorney fees in an "exceptional case" to be

> "• • • to give the court power to throw the burden of unnecessary and vexatious litigation on the shoulders of those who are responsible for it."

FMC was responsible for Walker's having had to defend an unwarranted action on an unwarranted patent. FMC was also responsible for protracting the litigation with vexatious evasion and suppression of facts. FMC should pay.

CONCLUSION.

For the reasons set forth above, the judgment of the Court of Appeals, affirming the judgment dismissing the second amended counterclaim, and the order denying Walker attorney fees, should be reversed.

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